IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 607

FRANCIS J. CURTIS, TRUSTEE IN BANKRUPTCY FOR BROKERS INSURANCE AGENCY, INC.,

Petitioner

vs.

RUSSELL BAKER, JOHN C. McKENZIE AND DWIGHT HIGHTOWER, individually, and as co-partners, doing business as BAKER, McKENZIE and HIGHTOWER,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Now come the respondents, Russell Baker, John C. McKenzie and Dwight Hightower, individually, and as co-partners, doing business as Baker, McKenzie and Hightower, by Joseph H. Hinshaw and Oswell G. Treadway, their attorneys, and show unto the Court the following matters and grounds why the above-captioned cause should not be reviewed by this Honorable Court:

OPINION BELOW.

The opinion of the Appellate Court of Illinois, affirming the judgment of the trial court, and from which the Supreme Court of Illinois denied leave to appeal, is reported 21 Ill. App. 2d 196, 157 N.E. 2d 773.

JURISDICTION.

The jurisdiction of this Court must necessarily be invoked under 28 U. S. C., sec. 1257(3), and in accordance with 28 U. S. C., sec. 2101(c).

QUESTION PRESENTED.

The question, as stated by the petitioner: "May a state deprive a bankrupt estate of an asset by forcing the trustee to pay a provable claim in a higher priority than it is given by the National Bankruptcy Act?" is not presented by the record under consideration here.

The petitioner admits that he did not institute proceedings in behalf of the bankrupt estate, upon the alleged claim against the respondents, as he was authorized and empowered to do by sec. 11(e) of the Bankruptcy Act, 11 U. S. C. sec. 29(e).

There is not a scintilla of evidence in the record tending to prove that the State of Illinois in any manner interfered with any right or power vested in the trustee by the Bankruptcy Act, or that the State forced him to pay any provable claim in order to pursue any asset of the bankrupt estate.

STATUTES INVOLVED.

The statutes involved are sufficiently quoted from in the petition.

STATEMENT OF THE CASE.

On August 4, 1952, Brokers Insurance Agency, Inc., a corporation, and three others, as plaintiffs, instituted their supposed action against the respondents here, in the Superior Court of Cook County, Illinois.

The petitioner admits that the supposed cause of action arose in 1950. He also admits that at the time the supposed action was instituted, Brokers Insurance Agency, Inc. was delinquent in the payment of its franchise taxes.

Ill. Rev. Stats., ch. 32, par. 157.142 provides:

> "No corporation required to pay a franchise tax, * * * shall maintain any action at law or suit in equity until all such franchise taxes * * * have been paid in full."

Under this statute, the action instituted by Brokers Insurance Agency, Inc. on August 4, 1952, could not be maintained.

On January 4, 1954, at the instance of the Attorney General, the Brokers Insurance Agency, Inc. was dissolved by order of the Superior Court of Cook County, Illinois, for failure to file its annual reports and to pay the franchise taxes assessed against it, and, as a corporate entity, ceased to exist.

In 1955, five years had elapsed since the supposed cause of action arose and the claim of Brokers Insurance Agency, Inc., if any it had, against the respondents here, became forever barred. Ill. Rev. Stats., ch. 83, par. 16, sec. 15.

On August 8, 1952, four days after it had instituted its supposed action against the respondents, Brokers In-

surance Agency, Inc. filed its voluntary petition in bankruptcy. On October 17, 1952 it was adjudicated a bankrupt, and on December 30, 1952, the petitioner, Francis J. Curtis, was appointed trustee by the bankruptcy court.

From the time of his appointment as trustee, until December 7, 1956, the petitioner took no action with respect to the supposed claim against the respondents or with respect to the supposed action instituted by Brokers Insurance Agency, Inc. except to allow the bankrupt's attorney to proceed with the supposed action. On that date the petitioner procured an order from the bankruptcy court permitting him to be substituted for and instead of Brokers Insurance Agency, Inc., in the supposed action, but without authority to assume any liability for the prosecution of the supposed action or obligation to prosecute it. (Rec. 221-223).

It was not, however, until May 2, 1957 that the petitioner effected this substitution. By that time more than seven years had elapsed since the supposed claim arose, more than four years had elapsed since Brokers Insurance Agency, Inc. had been adjudicated a bankrupt and the petitioner appointed trustee, and more than three years had elapsed since Brokers Insurance Agency, Inc. had ceased to be a corporate entity.

On October 1, 1957, the trial court sustained the defendants' motion and entered its judgment dismissing the supposed action.

The Appellate Court affirmed this judgment not for the reason that the petitioner "could not maintain an action in the Illinois courts until its franchise tax was paid," as stated by the petitioner, but for the reasons that are lucidly pointed out in the opinion of the Appellate Court. The petitioner's petition for leave to appeal was denied by the Supreme Court of Illinois.

ARGUMENT.

The petitioner has not pointed to any error in the judgment of the Appellate Court. He merely asserts that the decision "is in direct conflict with the federal courts' interpretation" of the Bankruptcy Act, but fails to point to any conflict. Nor do the cases to which this Court is referred indicate that there could be any conflict.

The Brokers Insurance Agency, Inc. was an Illinois corporation, doing business in Illinois, and Illinois, of course, had the right to prescribe the conditions under which it might have access to its courts. It has long been the established law of Illinois that a corporation may not maintain a cause of action at law or in equity unless and until it has paid its franchise taxes in full. Ill. Rev. Stats., ch. 32, par. 157.142. *Shore Management Corp. v. Erickson*, 314 Ill. App. 571.

On August 4, 1952, when it instituted its supposed action against the respondents here, it was delinquent in the payment of its franchise tax, and the Appellate Court was correct in holding that it had no right to commence a suit in the courts of Illinois. It remained delinquent and, at the instance of the State, was dissolved by order of court on January 4, 1954 by reason of its delinquency.

The fact, however, that Brokers Insurance Agency, Inc. could not, under the law, prosecute its supposed action, did not destroy the validity of the claim, if any validity it had. The petitioner, as trustee of the bankrupt estate, could have, under the Bankruptcy Statute, 11 U. S. C. sec. 29(e), instituted proceedings in behalf

of the estate upon the supposed claim within two years after the adjudication, or within the five-year period permitted by the law of Illinois, had he chosen to do so, and the courts of Illinois would have been open to him for that purpose had he chosen to use them. And, had he done so, the question of whether Brokers Insurance Agency, Inc. had paid its franchise tax would not have been involved. This, however, he did not do.

Instead, he did nothing, until long after the time permitted by Sec. 29(e) for instituting proceedings had expired, until long after the claim was barred by the Illinois Statute of Limitations, and until long after Brokers Insurance Agency had been dissolved because of its failure to pay its franchise taxes, and then the only action taken was to have himself purportedly substituted as a party plaintiff in the supposed action instituted by Brokers Insurance Agency, Inc., which, under the law of Illinois, it was prohibited from maintaining.

The purported substitution of the petitioner as a party plaintiff was a nullity, since Brokers Insurance Agency, Inc. had been dissolved and there was no entity for which he could be substituted. *American Exchange Bank v. Mitchell*; 179 Ill. App. 612, at page 615. It could not and, of course, did not, revive the corporation. As this Court pointed out in *Chicago Title & Trust Co. v. Forty-one Thirty-six W. Corp.*, 302 U. S. 120, at page 127:

> "There is nothing in the Federal Constitution which operates to restrain a state from terminating absolutely and unconditionally the existence of a state-created corporation, if that is authorized by the statute under which the corporation has been organized. And it hardly will be claimed that the Federal Government may breathe life into a corporate entity thus put to death by the state in the lawful exercise of its sovereign authority."

Furthermore, even had the purported substitution been effective, the petitioner would have merely taken over a suit which, under the law, could not be maintained. *Security Warehousing Co.* v. *Hand*, 206 U. S. 415, at 423.

It is true, of course, as the petitioner asserts, that the trustee need not intervene in a pending cause, particularly where there is good reason for not so doing. As pointed out in the cases relied upon by the petitioner, there may be many good reasons. The outcome of the cause may be so doubtful or speculative as not to justify intervention, the expense involved in prosecuting the cause may be disproportionate to the amount of the possible recovery, or, as here, the cause may be one which the bankrupt, under the law, is prohibited from maintaining. But, as is also pointed out in most of these cases, if he permits a pending suit to proceed, he is bound by any judgment that may be rendered. As stated in *Paradise* v. *Vogtlandische Maschinen-Fabrik*, 99 F. 2d 53, at page 55:

> "Furthermore, if the suit is thus continued by the bankrupt the trustees will be concluded by the judgment. *Eyster* v. *Gaff*, 91 U. S. 521, 23 L. ed. 403."

See also *Thatcher* v. *Rockwell*, 105 U.S. 467 at 470, cited also by the Petitioner.

While the choice of the method to be pursued rests largely with the trustee, subject, of course, to control by the bankruptcy court, his rights and powers are statutory and are prescribed and limited by the provisions of the Bankruptcy Act, and the choice must be one which can be pursued in accordance with the law.

Contrary to the petitioner's assertion, the holding of the Appellate Court does not force "the bankrupt or his estate to pay taxes to the state regardless of their pri-

ority under the Bankruptcy Act." It merely held that under the law of Illinois, which is in accord with that of other jurisdictions having similar statutes, the bankrupt could not maintain its supposed cause of action unless and until its franchise taxes were paid in full. The petitioner admits that at the time the supposed action was instituted, the franchise taxes were not paid. They were never paid by the bankrupt. At the time the petitioner purportedly had himself substituted as a party plaintiff, the bankrupt had long since been dissolved and was no longer in existence, the supposed claim was barred by the Statute of Limitations and the court had no alternative than to dismiss the supposed action. Neither the purported substitution nor the payment of the franchise tax at that time, could validate the supposed action or revive the supposed claim. The question of priority of claims under the Bankruptcy Act is not involved.

The petitioner has failed to point to any error in the judgment of the Appellate Court. The decision is not in conflict with the provisions of the Bankruptcy Act but, on the contrary, in accord with them. The facts disclose that the petitioner failed to exercise the rights and powers vested in him by the Bankruptcy Act to enforce the supposed claim. He did not act at all until long after it was barred by the Statute of Limitations. There is no valid reason justifying the granting of the writ or justifying a review of the judgment by this Honorable Court.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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